IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

O R D E R

S.B. CRIMINAL APPEAL NO.203/1988
(Kala @ Kalia Vs. State)

Date of order : 11.7.2006

P R E S E N T

HON'BLE MR. JUSTICE GOPAL KRISHAN VYAS

Mr. S.K. Poonia, for the appellant.
Mr. L.R. Upadhyay, Public Prosecutor.

This criminal appeal is directed against the judgment dated 19.4.1988 passed by Sessions Judge, Dungarpur in Sessions Case No.65/1987 whereby the appellant was acquitted from the charge of offence under Section 302 I.P.C. and convicted for offence under Section 323 I.P.C. and he was sentenced to one year simple imprisonment.

It is contended by the learned counsel for the appellant that appellant is real elder brother of deceased. As per the contention of FIR, some quarrel took place in between Shankar and Kala – the present appellant. During the quarrel, the appellant gave a

kick in the stomach of Shankar on account of which he died. After investigation, the Police filed challan under Section 302 I.P.C. against the appellant. As per the prosecution witness PW-7 – Dr. Bhagwati Prasad, who conducted the post-mortem, Shankar died on account of head injury. However relying upon the testimoney of PW-2 Ghoola to the extent that the accused gave kick in the stomach of Shankar and he died, the trial court convicted the appellant for offence under Section 323 I.P.C. It is contended by the learned counsel for the appellant that the testimoney of PW-2 Ghoola cannot be accepted because as per statement of PW-7 Dr. Bhagwati Prasad, the deceased died due to head injury, thus, it cannot be said that PW-2 Ghoola was present at the time the occurrence took place. The statement of PW-2 Ghoola is not trust-worthy. Hence, the judgment impugned to the extent of convicting the appellant for offence under Section 323 I.P.C. is also not sustainable in the eye of law.

Learned counsel for the appellant without prejudice to the above contentions contended that the appellant and deceased were real brothers and on the spur of moment due to sudden quarrel, injury upon the stomach was inflicted by the appellant and the said injury was not the cause of death, deceased fell down and received head injury which was cause of death, therefore, the appellant was not convicted for offence

under Section 302 I.P.C. as such it is prayed that the appellant may be given the benefits of probation under Section 366 Cr.P.C. The appellant is not a previous convict and he was 45 years of age at the time the occurrence took place. As per the record, the appellant has remained in custody from 22.8.1987 to 29.1.1988.

Learned Public Prosecutor opposed and contended that the judgment rendered by learned trial court is perfectly based upon the cogent evidence, which is on record. Learned Public Prosecutor also opposed the prayer for granting the benefits of probation to the appellant.

I have perused the judgment and scrutinized the evidence on record. In my opinion, the trial court has rightly recorded the finding of guilty against the appellant for offence under Section 323 I.P.C. and convicted and sentenced him as aforesaid. The occurrence took place in the year 1987 and the appeal is pending before this Court since 1988. Thus, near-about 18 years have elapsed.

Looking to the facts and circumstances of the case and in the interest of justice, while maintaining the conviction awarded to the appellant and looking to the fact that appellant remained in custody from 22.8.1987 to 29.1.1988, the judgment rendered by

learned trial court dated 19.4.1988 is modified and it is directed that the sentence awarded to the appellant is reduced to already undergone. The bail bonds filed by the appellant are discharged.

With the aforesaid modifications and directions, the appeal stands partly allowed.

(GOPAL KRISHAN VYAS), J.

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